Eugene Planning Commission

AGENDA

Meeting Location:
Sloat Room—Atrium Building
99 W. 10th Avenue
Eugene, OR 97401

Phone: 541-682-5481
www.eugene-or.gov/pc

The Eugene Planning Commission welcomes your interest in these agenda items. Feel free to come and go as you please at any of the meetings. This meeting location is wheelchair-accessible. For the hearing impaired, FM assistive-listening devices are available or an interpreter can be provided with 48 hour notice prior to the meeting. Spanish-language interpretation will also be provided with 48 hour notice. To arrange for these services, contact the Planning Division at 541-682-5675.

MONDAY, FEBRUARY 8, 2016 – REGULAR MEETING (11:30 a.m.)

11:30 a.m. I. PUBLIC COMMENT

The Planning Commission reserves 10 minutes at the beginning of this meeting for public comment. The public may comment on any matter, **except for items scheduled for public hearing or public hearing items for which the record has already closed.** Generally, the time limit for public comment is three minutes; however, the Planning Commission reserves the option to reduce the time allowed each speaker based on the number of people requesting to speak.

11:40 a.m. II. APPEAL OF HEARINGS OFFICIAL DECISION: CHAMOTEE TRAILS PUD (PDT 15-1) – DELIBERATIONS/POSSIBLE ACTION

Lead City Staff: Erik Berg-Johansen, 541-682-5437
erik.berg@ci.eugene.or.us

1:15 p.m. III. ITEMS FROM COMMISSION AND STAFF

A. Other Items from Staff
B. Other Items from Commission
C. Learning: How are we doing?

Commissioners: Steven Baker; John Barofsky; John Jaworski (Chair); Jeffrey Mills; Brianna Nicolello; William Randall; Kristen Taylor (Vice Chair)

AGENDA ITEM SUMMARY
February 8, 2016

To: Eugene Planning Commission

From: Erik Berg-Johansen, Assistant Planner

Subject: Deliberations: Chamotee Trails PUD (City File PDT 15-1)

ACTION REQUESTED
To deliberate and take action on an appeal of the Eugene Hearings Official's denial of the Chamotee Trails PUD (PDT 15-1).

BACKGROUND INFORMATION
Extensive background information on this proposal and the previous Hearings Official decision is included in the full record provided separately, as well as the prior Agenda Item Summary (AIS) for the public hearing.

On January 26, 2016, the Planning Commission (PC) held a public hearing to consider testimony from the applicant (also the appellant) and other interested parties. The applicant's attorney, Bill Kloos, and project representative, Renee Clough, were present at the hearing and provided oral testimony in response to the Hearings Official's decision to deny the proposal based on the "19-lot rule". One neighbor was present to testify in support of the Hearings Official's decision to deny the application.

During the public hearing on January 26, 2016, the Planning Commission asked staff a number of questions, and requested that answers be provided to the Commission before deliberations occurred. The purpose of this AIS and the City Attorney Memo (attached) are to answer these questions and provide the PC with a summary of key issues in this appeal.

As mentioned in the previous AIS for the public hearing, the PC's first step during deliberations is to determine whether or not the HO erred in his decision. In the event the PC decides the HO erred, the PC must articulate in its written decision the exact way(s) in which he erred.

KEY ISSUES
As outlined in the January 26, 2016 AIS, the appeal before the PC primarily focuses on Eugene Code (EC) 9.8325(6)(c), also referred to as the 19-lot rule. In order to arrive at a decision on this appeal, the PC needs to address the following questions:

1) Based on the full reading of EC 9.8325(6)(c), did the Hearings Official err in finding that the Tentative PUD failed to comply with the 19-lot rule?

2) If the PC agrees with the Hearings Official (regarding the 19-lot rule), does the PC believe the Hearings Official erred in finding that EC 9.8325(6)(c) is clear and objective and therefore, can be applied as a required criterion?

The City Attorney has provided a memorandum (see Attachment A) which provides a comprehensive legal analysis to aid the PC in addressing these questions, while also responding to related questions raised by the PC at the January 26, 2016 public hearing. We recommend the PC carefully review this memo prior to your deliberations on February 8, 2016.

In addition to the PC questions addressed in the City Attorney's memo, the PC asked additional questions in regards to the subject appeal. While answers to some of the questions would require staff to explore information outside of the record and/or outside the scope of this appeal, staff has attempted to answer the remaining PC questions to the extent possible.

Commissioner Baker inquired if ingress and egress is addressed through the Planned Unit Development (PUD) General Criteria. Criteria (5) and (6) under EC 9.8320, which are provided in Attachment B, relate to circulation, transportation, and emergency response issues. Any comment regarding whether or not the subject PUD proposal could meet criteria (5) and (6) of the General Criteria cannot be discussed as it is outside the scope of the appeal.

Commissioner Baker also posed the following question: Could the applicant have proposed a PUD that took access on Vivian Drive (the unimproved right-of-way adjacent to the subject property)? The Chamotee Trails PUD staff report stated: "In this case, referral comments from Public Works staff note that the maximum street grade permitted in hillside developments is fifteen percent (15%), and as noted above, EC 9.8325(5) prohibits grading on portions of the development site that meet or exceed 20% slope" (page 6).

While construction of a new street *through* the development site may not be feasible due to topography, staff never evaluated the potential of improving the Vivian Drive right-of-way because it was not proposed by the applicant. In fact, the applicant specifically proposed *not* to improve or otherwise take access onto Vivian Drive. As a result, there is no evidence in the record that addresses the development potential of Vivian Drive other than the comment from Public Works staff about slopes as noted above. That said, the applicant's revised site plan (Record 158) illustrates that the upper portion of Vivian Drive exceeds 20% slopes. This leads to a conclusion that at least a portion of the Vivian Drive right-of-way could not be developed subject to the Needed Housing Criteria, or per the Public Works standard that prohibits hillside street grading in areas exceeding 15% slope. Other alternatives, such as partial improvement or temporary surfacing to allow driveway access from Vivian Drive were not considered or further addressed in the record.

A number of Commissioners also inquired about the City's Fire Code. While the question of compliance with the Fire Code is not within the scope of this appeal, the PC can find the Fire Department referral for the subject project at Record 455. In this referral, the Fire Marshal's Office cites Eugene Fire Code Appendix D, Section D107.1, an excerpt of which is provided in Attachment C.

NEXT STEPS

The PC needs to determine their position on this appeal, including specific direction on any modified or supplemental findings that may be necessary to support the PC's conclusion. Pending further deliberation and direction from the commission, staff will prepare a Final Order for consideration and final action. The Planning Commission has essentially three options: 1) uphold the Hearings Official's decision and adopt his findings; 2) uphold the Hearings Official's decision with new or amended findings; or 3) overturn the Hearings Official decision and approve the proposal.

ATTACHMENTS

A. City Attorney Memo
B. PUD General Criteria (5) and (6)
C. Fire Code Excerpt

The full record has already been provided to commissioners separately, and is also available to the public on the City's website at:
http://pdd.eugene-or.gov/LandUse/SearchApplicationDocuments?file=PDT-15-0001

A hardcopy of the complete record can also be made available for free inspection at the Atrium Building, 99 West 10th Avenue, between 9:00 a.m. and 5:00 p.m. Monday through Friday. Copies may also be obtained at cost.

FOR MORE INFORMATION:

Please contact Erik Berg-Johansen, Assistant Planner, City of Eugene Planning Division, at 541-682-5437 or via email at erik.berg@ci.eugene.or.us

Eugene City Attorney's Office

Memorandum

Date: **February 2, 2016**

To: **Planning Commission**

From: **Anne C. Davies**

Subject: **Chamotee Trails PUD (PDT 15-1 / ARA 15-13)**

This memo is provided to assist the Planning Commission in working through the appeal issues in the Chamotee PUD appeal. At the public hearing on January 26, 2015, the applicant's attorney provided lengthy legal argument regarding the appeal issues. There was no organized opposition and no presentation providing countering legal arguments. Accordingly, the city attorney provides the following guidance on the purely legal issues before the Planning Commission in this appeal.

First, as the commission is aware, your review is somewhat limited in the context of a local appeal of an initial hearings official decision. You are limited to the issues that were raised in the local notice of appeal. *See* Notice of Appeal, Record 7-17. As a general matter, an appellant can only assign error to findings or conclusions of the hearings official that relate to relevant approval criteria. For instance, compliance with the fire code is not a requirement under the applicable PUD approval criteria. The assignments of error in this appeal relate to EC 9.8325(6)(c) and EC 9.8325(3). Further, in order to overturn the hearings official decision, you must first determine that the HO erred and explain in your final decision how he erred.

The applicant correctly outlined the process for deciding the appeal issues. That is, the Planning Commission should first decide, looking just at the text, context and possibly legislative history, what it believes EC 9.8325(6)(c) means. If the commission decides that the HO did not err in its interpretation of the meaning of EC 9.8325(6)(c), then the commission should address the applicant's "needed housing" arguments. This memo is organized in the same manner the applicant addressed the issues at the public hearing.

A. Code Interpretation.

The provision at the heart of this appeal is EC 9.8325(6)(c). EC 9.8325(6) provides, in full:

> "The PUD provides safe and adequate transportation systems through compliance with all of the following:

> "(a) EC 9.6800 though EC 9.6875 Standards for Streets, Alleys, and Other Public Ways.
>
> "(b) Provision of pedestrian, bicycle and transit circulation among buildings located within the development site, as well as to adjacent and nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks, provided the city makes findings to demonstrate consistency with constitutional requirements. 'Nearby' means uses within 1/4 mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists.
>
> "(c) The street layout of the proposed PUD shall disperse motor vehicle traffic onto more than one public local street when the PUD exceeds 19 lots or when the sum of proposed PUD lots and the existing lots utilizing a local street as the single means of ingress and egress exceeds 19."

The Planning Commission is often called upon in an appeal of a land use application to determine the meaning of a particular land use code provision. The commission's task in this regard is to discern the intent of the City Council when it adopted the code provision. The Planning Commission is to look at the text and context of the provision, and legislative history where appropriate or relevant.

The applicant in this case asserts that it satisfies EC 9.8325(6)(c) because a car can turn left or right out of the proposed PUD onto West Amazon Drive. In this case, the applicant takes a very literal, focused view of specific words in the approval criterion; *e.g.*, "local public street" and "disperse." Under its interpretation, because of the literal meaning of the terms discussed, the proposed application satisfies the approval criterion even though West Amazon Drive does not provide actual dispersal of traffic to the north. *See* Applicant's Hearing Memo dated November 3, 2015, Record 418 (last paragraph); Applicant's Final Argument, dated November 23, 2015, Record 88-90; Applicant's appeal statement dated December 16, 2015, Record 10-12.[1]

1. Response to Commissioner Questions.

Commissioner Taylor asked for clarification on several points regarding applicant's testimony at the hearing. First, she asked for assistance in locating places in the record that would assist in determining the meaning of the term "disperse." The citations to the record found in the previous paragraph are the places where applicant has discussed the meaning of this term. The Planning Commission's interpretation of this provision from the Deerbrook decision also provides guidance on how this body has interpreted EC 9.8325(6)(c) in a previous similar case. Record 76 (quoted below).

[1] Applicant is correct that, where a term is not defined in the code or in a relevant statute, it is appropriate to resort to dictionary definitions.

Second, Commissioner Taylor asked for clarification about the use of the word "or" in EC 9.8325(6)(c). As the city attorney reads the provision, it requires that the street layout of the PUD disperse traffic onto more than one public local street in one of two situations: first, where the PUD itself exceeds 19 lots; and second, where the number of lots proposed in the PUD plus the number of existing lots that use a local street as the single means of ingress and egress, is greater than 19. It does not appear that the applicant disagrees with this reading.

Finally, Commissioner Mills asked whether staff agrees with the applicant's definition of the term "public local street." As relevant, the term "street" is defined in the code as follows: "An improved or unimproved public or private way, other than an alley, that is provided to create ingress or egress for vehicular traffic to one or more lots or parcels . . ." EC 9.0500.

2. Did Hearings Official Err in His Interpretation of EC 9.8325(6)(c)?

Applicant's approach to the interpretation of EC 9.8325(6)(c) is to view individual terms in isolation. Staff and the Hearings Official, on the other hand, take a broader, more contextual view of the provision. *See* HO decision, Record 77-79; PC Agenda – page 37-39. Both the Hearings Official and staff started with the Planning Commission's interpretation of this same provision in its review of the Deerbrook PUD. In that case, the Planning Commission was presented with a proposed PUD in which an existing street ran in the south/west direction through the center of the proposed PUD. Traffic could enter and exit the proposed development on that street to the north or to the south. The Planning Commission described the 19-lot rule as follows:

> "This standard is really about dead-end streets, where there is only one way in or out. With the applicant's improvement of West Amazon Drive, the site can be accessed from the north via Martin Street or from the south via Fox Hollow Road. The issue here would have been if West Amazon Drive did not connect to Fox Hollow Road. The Applicant's improvements will complete the missing connecting link in the street system." Record 76; PC Agenda – Page 36.

The Hearings Official in this case explained that there is no definition of the term "disperse" that would allow approval under the 19-lot rule where the layout of the PUD relies on only one public street to disperse motor vehicle traffic and where traffic flowing in one direction on that street terminates in a dead end. Record 78. In other words, although the term "local public street" includes both improved and unimproved public ways, a dead end, unimproved street that will never be improved cannot be said to "disperse" motor vehicle traffic. Where viewing the term "disperse" in isolation could result in satisfaction with the criterion, when read in context of the entire sentence, the entire provision, and, in this situation motor vehicle traffic is not being dispersed onto more than one local street. Record 78, paragraph 1-4.

The Planning Commission must attempt to discern what the City Council intended the provision to mean.[2] If the Planning Commission determines that the HO erred in its interpretation and conclusion that the applicant failed to satisfy this criterion, then the commission need not proceed further in the analysis. It would adopt findings explaining how the HO erred and supporting its approval of the PUD application. If, however, the Planning Commission determines that the HO did not err in its interpretation and, based on that interpretation, concluding that criterion satisfied, proceed to next needed housing analysis.

B. Needed Housing.

Applicant argues that, even if the Hearings Official interpretation of the code provision is correct, the application cannot be denied based on failure to comply with that criterion because the criterion is not "clear and objective" and therefore cannot be applied in this case.[3]

1. The Clear and Objective Requirement.

The city attorney provided a summary of the genesis of the "clear and objective" requirement. *See* City Attorney Memo dated November 12, 2015, Record 117-18. As explained in that memo, the purpose of the "clear and objective" requirement was to provide predictability for a developer of needed housing. Where a criterion is "clear and objective," as opposed to discretionary and subjective, an applicant has a better chance of knowing upfront whether the proposal is likely to be approved. It also makes it harder for a local decision maker to deny a needed housing proposal, based on political pressure and wishy washy standards, just because neighbors are opposed to unwanted housing development in their neighborhood.

While not extremely helpful, LUBA has described what "clear and objective" means as follows:

> "'Needed housing' is not to be subjected to standards, conditions or procedures that involve subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community."

[2] The Hearings Official declined to consider legislative history ("I decline to delve into the offered legislative history of the 19 lot rule because it is my opinion that the text and context of EC 9.8325(6)(c) is sufficient to resolve the competing arguments." Record 78. The city attorney agrees that the legislative history does not provide any additional insight.

[3] As relevant, ORS 197.307(4) provides:

> "(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

Where a local government has subjective, "value-laden" criteria in its code that are designed to balance or mitigate impacts of the development, those criteria are not clear and objective and cannot be applied to a needed housing application. LUBA and the Court of Appeals have been called upon numerous times to determine whether certain criteria qualify as "clear and objective." In general, a numerical standard will almost certainly qualify as clear and objective; *e.g.*, "landscaping exceeds 15% of lot area." At the other end of the spectrum, a discretionary standard like "compatibility with the neighborhood" will certainly NOT qualify as clear and objective. Other such criteria that are not "clear and objective" include: "will not unduly impair traffic flow or safety in the neighborhood;" "not be detrimental or injurious to property and improvement in the neighborhood or to the general welfare of the community." It is the criteria that fall in between those two extremes that are harder to evaluate.

2. Did the Hearings Official Err in Determining that EC 9.8325(6)(c) is Clear and Objective?

The commission must determine whether the Hearings Official erred in determining that EC 9.8325(6)(c), as a whole, is clear and objective. The Hearings Official found:

> "As an initial matter, I find that EC 9.8325(6)(c) is a clear and objective standard. It represents a simple counting exercise and a determination whether more than one point of ingress and egress is available to disperse motor vehicle traffic. The standard does not represent a 'subjective, value laden analyses that are designed to balance or mitigate impacts.' *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158, aff'd 158 Or App 1 (1999). It is also my conclusion that the necessity to determine the plain meaning of words such as 'disperse' or 'motor vehicle traffic' does not transform the clear and objective standard into a discretionary exercise. Nor does taking account of evidence in the record with regard to the current condition of West Amazon make application of the standard less clear and objective." Record 77-78.

Applicant cites cases where LUBA and/or the courts have struck provisions as not clear and objective. Record 91. Many of the criteria that LUBA and the courts struck in those cases were, indeed, subjective and value-laden. However, none of these provisions was the 19-lot rule at issue in this case. This is the first time that anyone has argued that the 19-lot rule is not clear and objective.[4] In its discussions of whether the 19-lot rule is clear and objective, the commission should keep in mind that a criterion is not subjective or value-laden just because it is ambiguous (*i.e.*, susceptible to more than one interpretation).

The Court of Appeals has determined that a provision that prohibits development on a land that exceeds 20% slope is clear and objective even though slope can be measured in more than one way. In *Rudell v. City of Bandon*, the Court reviewed a provision that prohibited development on

[4] In Deerbrook, the Planning Commission interpreted the provision but was not presented with the question whether it was clear and objective.

identified foredunes. The term foredunes was defined in the city's code to include the "lee or reverse slope (backside)." The city turned to the dictionary definition of "lee," "slope" and "reverse slope" and interpreted foredune to include "the area that extends from the top surface to the landward point where the slope ends and the ground becomes *relatively level*." The Court disagreed with the applicant that the term "relatively level" introduced subjectivity and concluded that the city's conclusion and interpretation was clear and objective.

Note: Applicant's BLI Argument

> Applicant asserts that when a property is on the local government's buildable land inventory ("BLI") (*i.e.*, the inventory that provides the land supply that is available within the UGB for residential development), that property must be developable under the City's clear and objective needed housing criteria. The Hearings Official disagreed with the applicant on this point and adopted the city attorney's analysis. Record 78, 121-22. Further, even if the applicant were correct that a property on the BLI must be developable under clear and objective standards, that does not mean that the City must approve any needed housing development proposal that an applicant chooses to propose. There may be another proposal or several other proposals that could comply with the clear and objective standard on a particular piece of property.[5]

3. Conclusion.

The Planning Commission must decide whether the Hearings Official erred in determining that the 19-lot rule is clear and objective for purposes of ORS 197.307(4). If it is clear and objective, then because the Planning Commission already determined that it agreed with the Hearings Official's code interpretation, the Planning Commission would simply affirm the Hearings Official decision. If the provision is not clear and objective, the Planning Commission cannot use it as a basis to deny the proposed needed housing application.

[5] Some of the legal propositions that the applicant asserts are key issues that are being discussed in the context of Envision Eugene and the City's UGB expansion work. Not only are those issues not relevant here, the Planning Commission's choice to delve into those issue now would put the cart before the horse on Envision Eugene.

Applicant also asserts that Group B is directly on point and dictates reversal of the Hearings Official decision. Applicant's focus on that case is misplaced. This memo will not spend much time on discussion of that case other than to state: Group B is not on point; as the Hearings Official pointed out, it "involved a unique outlier condition that was a peculiar historical appendage to the specific property at issue" (Record 79); and applicant's reliance on isolated statements in the LUBA opinion are generally taken out of context and used to support vast propositions that those statements were not intended to support.

PUD General Criteria – (5) and (6)

9.8320 Tentative Planned Unit Development Approval Criteria- General.

(5) The PUD provides safe and adequate transportation systems through compliance with the following:

(a) EC 9.6800 through EC 9.6875 Standards for Streets, Alleys, and Other Public Ways (not subject to modifications set forth in subsection (10) below).
(b) Pedestrian, bicycle and transit circulation, including related facilities, as needed among buildings and related uses on the development site, as well as to adjacent and nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks, provided the city makes findings to demonstrate consistency with constitutional requirements. “Nearby” means uses within 1/4 mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists.
(c) The provisions of the Traffic Impact Analysis Review of EC 9.8650 through 9.8680 where applicable.

(6) The PUD will not be a significant risk to public health and safety, including but not limited to soil erosion, slope failure, stormwater or flood hazard, or an impediment to emergency response.

Eugene Fire Code Section D107
One- or Two-Family Residential Developments

D107.1 One- or two-family dwelling residential developments. Developments of one- or two-family dwellings where the number of dwelling units exceeds 30 shall be provided with separate and approved fire apparatus access roads and shall meet the requirements of Section D104.3.

Exceptions:

1. Where there are more than 30 dwelling units on a single public or private fire apparatus access road and all dwelling units are equipped throughout with an approved automatic sprinkler system in accordance with Section 903.3.1.1, 903.3.1.2 or 903.3.1.3, access from two directions shall not be required.
2. The number of dwelling units on a single fire apparatus access road shall not be increased unless fire apparatus access roads will connect with future development, as determined by the fire code official.